(18,842.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 614.

AUGUST CLIFF, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

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1 Pleas had at a regular term of the district court of the United States for the northern division of the northern district of Illinois, begun and held at the United States court-rooms, in the city of Chicago, in said division of said district, on the third Monday of December (it being the fifteenth day thereof), in the year of our Lord one thousand nine hundred and two, and of the Independence of the United States of America the one hundred and twenty-seventh year.

Present: The Honorable Christian C. Kohlsaat, judge of said court and the Honorable J. Otis Humphrey, judge of the district court of the United States for the southern district of Illinois, sitting in this court by designation, presiding, John C. Ames, marshal for the northern district of Illinois, and T. C. MacMillan, clerk of the district court of the United States for the northern district of Illinois.

2 THE UNITED STATES
vs.
AUGUST CLIFF. } 3415.

Be it remembered that heretofore, to wit, on the 22nd day of January, A. D. 1903, it being one of the days of the December, 1902, term of the district court of the United States for the northern division of the northern district of Illinois, begun and held in the United States court-rooms in the city of Chicago, in said division of said district on the third Monday of December, it being the fifteenth day thereof in the year of our Lord one thousand nine hundred and two and of the Independence of the United States of America the one hundred and twenty-seventh year, before the Honorable Christian C. Kohlsaat, judge of said court, presiding, the following order was had and entered of record in said cause, to wit:

3 THE UNITED STATES
vs.
AUGUST CLIFF. } 3415.

Comes S. H. Bethea, Esq., district attorney and presents the affidavit of Joseph A. Painter and a criminal information against August Cliff based thereon and asks leave of the court to file the same; whereupon it is ordered by the court that said affidavit and information be filed and the cause placed upon the dockets of this court.

And afterwards to wit on the 22nd day of January, A. D. 1903 said affidavit was filed, the same being in the words and figures following, to wit:

In the District Court of the United States of America for the Northern District of Illinois, Northern Division.

NORTHERN DISTRICT OF ILLINOIS, *Northern Division,* } *sct:*

Joseph A. Painter being first duly sworn, on oath, deposes and says that he resides in the city of Chicago, Illinois; that he is a deputy internal-revenue collector in and for the first internal-revenue collection district of Illinois; that on, to wit, the 22nd day of December, A. D. 1902, August Cliff in the city of Chicago, in the division and district aforesaid, and in the first internal-revenue collection district of Illinois, was a retail dealer in oleomargarine; that the said August Cliff at the time and place aforesaid, so being such retail dealer in oleomargarine, unlawfully did knowingly purchase and receive for sale certain oleomargarine which had not
4 been stamped according to law, that is to say, ten pounds of a mixture and compound composed, as he the said August Cliff, then and there well knew, of oleo oil, neutral lard, cotton-seed oil, milk, common salt, and palm oil; that said last-named ingredient, to wit, palm oil, produced an artificial coloration in the said oleomargarine that caused it to look like butter of a shade of yellow; that said oleomargarine had then lately before, to wit, on the day aforesaid, been manufactured at Chicago aforesaid, by Wm. J. Moxley, a corporation organized and existing under and by virtue of the laws of the State of Illinois; that said oleomargarine was then and there purchased and received for sale by the said August Cliff as aforesaid from the said Wm. J. Moxley, a corporation as aforesaid; and that when said oleomargarine was purchased and received for sale as aforesaid, it was contained in a new wooden original manufacturer's package to which, as the said August Cliff then and there well knew, no coupon, stamp or stamps in the sum of ten cents for each pound of oleomargarine so contained therein had then and there been or was affixed by the said manufacturer, or by any other person, for denoting the payment of the internal-revenue tax on the oleomargarine so contained therein.

The said Joseph A. Painter therefore prays that the said August Cliff may be apprehended and held to answer said charge and to be further dealt with according to law.

Dated this 23rd day of December, A. D. 1902.

JOSEPH A. PAINTER.

Subscribed and sworn to before me this 23rd day of December, A. D. 1902.

CHAS. A. BUELL,
Deputy Clerk U. S. Dist. Court, Northern Dist. of Illinois.

Endorsed: U. S. district court for the N. dist. of Ills., N. div. No. 3415. The United States *vs.* August Cliff. Affidavit. Filed Jan. 22, 1903, at 2 o'clock p. m. T. C. MacMillan, clerk. (B.)

5 And afterwards, to wit, on the 22d day of January, A. D. 1903, there was filed in the clerk's office of said court in the above-entitled cause, a criminal information, the same being in the words and figures following, to wit:

In the District Court of the United States of America for the Northern District of Illinois, Northern Division, of the December Term, in the Year of Our Lord Nineteen Hundred and Two.

NORTHERN DISTRICT OF ILLINOIS, } *sct:*
Northern Division, }

Be it remembered, that S. H. Bethea, attorney of the United States of America for the northern district of Illinois, who for the said United States in this behalf prosecutes, in his own person comes here into the district court of the said United States for the division and district aforesaid, on this twenty-second day of January, in this same term, and for the said United States gives the court here to understand and be informed, that August Cliff, late of the city of Chicago, in the said division and district, on the twenty-second day of December, in the year of our Lord nineteen hundred and two, at Chicago aforesaid, in the division and district aforesaid and in the first internal-revenue collection district of Illinois, was a retail dealer in oleomargarine; and that the said August Cliff then and there, so being such retail dealer in oleomargarine, unlawfully did knowingly purchase and receive for sale certain oleomargarine which had not been stamped according to law,—that is to say, ten pounds of a mixture and compound composed, as he the said August Cliff well knew, of oleo oil, neutral lard, cotton-seed oil, milk, common salt, and palm oil (which said last-named ingredient, to wit, palm oil, produced an artificial coloration in the said oleo-
6 margarine that caused it to look like butter of a shade of yellow), which said oleomargarine had then lately before, to wit, on the day aforesaid, been manufactured at Chicago aforesaid by William J. Moxley, a corporation organized and existing under and by virtue of the laws of the State of Illinois, and then and there was purchased and received for sale by the said August Cliff as aforesaid from the said William J. Moxley, a corporation as aforesaid, and, when so as aforesaid purchased and received for sale, was contained in a new wooden original manufacturer's package to which, as he, the said August Cliff then and there well knew, no coupon stamp or stamps, in the sum of ten cents for each pound of oleomargarine so contained therein, then and there had been or was affixed by the said manufacturer, or by any other person, for denoting the payment of the internal-revenue tax on the oleomargarine so contained therein; against the peace and dignity of the said United States, and contrary to the form of the statute of the same in such case made and provided.

Whereupon the said attorney of the said United States prays the consideration of the court here in the premises, and that due process of law may be awarded against him, the said August Cliff, in this

behalf, to make him, answer to the said United States concerning the premises aforesaid.

S. H. BETHEA,
United States Attorney.

Endorsed: No. 3415. U. S. district court for the N. dist. of Ills., N. div. The United States *vs.* August Cliff. Information on sec. 11, act of Aug. 2, 1886, as amended by sec. 3, act of May, 9, 1902 internal-revenue laws. Filed in open court Jan. 22, 1903 at 2 o'clock p. m. T. C. MacMillan, clerk S. H. Bethea, U. S. att'y N. dist. Ill.

7 And afterwards, to wit, on the 22nd day of January, A. D. 1903, the following order was had and entered of record in said cause, before the Hon. Christian C. Kohlsaat, judge, to wit:

THE UNITED STATES
vs.
AUGUST CLIFF. } 3415.

Comes the United States by S. H. Bethea, Esq., district attorney, comes also the defendant, August Cliff, in his own proper person as well as by counsel and said defendant being arraigned upon the information filed herein against him pleads not guilty thereto and the parties having waived the intervention of a jury, the cause is submitted to the court for trial, whereupon, after the hearing by the court of the evidence by the parties adduced and arguments of counsel, the said defendant by his attorney moves the court to find the defendant not guilty, which said motion is by the court overruled and denied, to which ruling of the court said defendant by his attorney duly excepts. Thereupon the court being fully advised in the premises finds the defendant August Cliff guilty as charged in the information. Thereupon the defendant by his attorney enters his motion for a new trial herein which said motion after hearing of arguments and due consideration by the court is overruled and denied, and thereupon said defendant by his attorney enters his motion in arrest of judgment which motion in arrest after hearing of arguments and due consideration by the court is overruled and denied, and said defendant being asked by the court if he has anything to say why the sentence and judgment of the court should not now be pronounced upon him and showing no good and sufficient reasons why sentence and judgment should not be pronounced, it is therefore considered by the court and as the sentence and judgment of the court upon the finding of guilty herein as aforesaid that the defendant August Cliff forfeit and pay to the United States a fine in the sum of fifty dollars besides the costs in this behalf expended, and that execution shall issue therefor.

8 And afterwards, to wit, on the 27th of January, A. D. 1903, the following order was had and entered of record in said cause, before the Hon. Christian C. Kohlsaat, judge, to wit:

THE UNITED STATES
vs.
AUGUST CLIFF. } 3415.

Come the parties by their attorneys and on motion it is ordered by the court that leave be and it hereby is given said defendant to file his waiver of jury, motion to find defendant not guilty, and motion for a new trial herein, *nunc pro tunc* as of January 22, 1903.

And afterwards, to wit, on the 27th day of January, A. D. 1903, there was filed in the clerk's office of said court, in the above-entitled cause, a waiver of jury trial, the same being in the words and figures following, to wit:

9 UNITED STATES OF AMERICA
Northern District of Illinois, Northern Division, } *ss:*

In the District Court, December Term, A. D. 1902.

UNITED STATES OF AMERICA,
vs.
AUGUST CLIFF. } Information.

Waiver of Jury Trial.

Now comes the respective parties and, by their counsel, waive a trial by jury herein and agree to submit the issues herein to the court.

Dated January 22, 1903.

S. H. BETHEA,
U. S. Att'y, for the Government.
WILLIAM D. GUTHRIE,
FRANCIS J. KEARFUL,
CHARLES C. CARNAHAN,
DELAVAN B. COLE,
For the Defendant.

Endorsed: District court of U. S. Northern district of Ill., northern division. Waiver of jury trial. United States of America *vs.* August Cliff. Gen. No. 3415. Filed by leave of court Jan. 27, 1903, at 10 o'clock a. m. T. C. MacMillan, clerk. *Nunc pro tunc* Jan. 22, 1903.

10 And afterwards, to wit, on the 27th day of January, A. D. 1903, there was filed in the clerk's office of said court in the above-entitled cause, a motion to find the defendant not guilty, the same being in the words and figures following, to wit:

UNITED STATES OF AMERICA,
Northern District of Illinois, Northern Division, } ss:

In the District Court, December Term, A. D. 1892.

UNITED STATES OF AMERICA
vs.
AUGUST CLIFF. } Information.

Motion to Find Defendant Not Guilty.

Comes now the defendant, by his counsel, and, upon the evidence before the court, moves the court to find in favor of the defendant and to render a verdict and judgment of not guilty and that he be discharged, because the act of Congress relating to butter and oleomargarine of August 2, 1886, as amended by the act of Congress of May 9, 1902, in so far as it imposed a tax of ten cents per pound on oleomargarine containing "artificial coloration that causes it to look like butter of any shade of yellow," and in so far as it authorizes the Commissioner of Internal Revenue "to decide what substances, extracts, mixtures and compounds which may be submitted for his inspection in contested cases are to be taxed upon this act," and provides "that his decision in matters of taxation under the act shall be final," *it* is in contravention of the Constitution of the United States and of the amendments thereto and is illegal and void, for the following reasons, to wit:

First. The act deprives the defendant and the oleomargarine manufacturers and dealers in the United States of their liberty and property without due process of law.

Second. The act is an unwarranted encroachment upon and interference with the police powers reserved to the several States and to the people of the United States;

Third. The act invests inferior executive officers with the power finally and arbitrarily to determine essentially judicial questions concerning vast property rights;

11 Fourth. The act so arbitrarily discriminates against oleomargarine in favor of butter in the United States as to be repugnant to *the* those fundamental principles of equality and justice which are inherent in the Constitution of the United States.

Dated January 22, 1903.

WILLIAM D. GUTHRIE.
FRANCIS J. KEARFUL.
CHARLES C. CARNAHAN.
DELAVAN B. COLE.

Endorsed: District court of U. S., northern district of Ill., northern division. Motion to find the defendant not guilty. United States of America, *vs.* August Cliff. Gen. No. 3415. Filed by leave of court Jan. 27, 1903, at 10 o'clock a. m. T. C. MacMillan, clerk. *Nunc pro tunc*, Jan. 22, 1903.

12 And afterwards, to wit, on the 22nd day of January, A. D. 1903, there was filed in the clerk's office of said court in the above-entitled cause, a motion for a new trial, same being in the words and figures following, to wit:

UNITED STATES OF AMERICA,
Northern District of Illinois, Northern Division, } ss:

In the District Court, December Term, A. D. 1902.

UNITED STATES OF AMERICA
vs.
AUGUST CLIFF. } 3415. Information.

Motion for New Trial.

Now comes the defendant and moves the court to set aside the finding of guilty herein and to grant a new trial of said cause for the following reasons, to wit:

(1.) The finding is contrary to the evidence.
(2.) The finding is contrary to the law.
(3.) The court struck out and refused to consider proper evidence offered and received on behalf of the defendant.

Dated January 22, 1903.

WILLIAM D. GUTHRIE,
FRANCIS J. KEARFUL,
CHARLES C. CARNAHAN,
DELAVAN B. COLE,
Attorneys for Defendant.

Endorsed: District court of U. S., northern district of Ill., northern division. Motion for new trial. United States of America *vs.* August Cliff. Gen. No. 3415. Filed by leave of court Jan. 27, 1903, at 10 o'clock a. m. T. C. MacMillan, clerk. *Nunc pro tunc*, Jan. 22, 1903.

13 And afterwards, to wit, on the 27th day of January, A. D. 1903, there was filed in the clerk's office of said court in the above-entitled cause, a bill of exceptions, same being in the words and figures following, to wit:

UNITED STATES OF AMERICA,
Northern District of Illinois, Northern Division, } ss:

In the District Court, December Term, A. D. 1902.

UNITED STATES OF AMERICA
vs.
AUGUST CLIFF. } 3415. Information.

Bill of Exceptions.

Be it remembered, that the above-entitled cause, coming on for trial on the 22nd day of January, A. D. 1903, the same being one of

the days of the regular December, 1902, term of said court, before the Hon. Christian C. Kohlsaat, judge of said court, the Government appearing by its counsel, Solomon H. Bethea and Oliver E. Pagin, and the defendant appearing in person and by his counsel, William D. Guthrie, Francis J. Kearful, Charles C. Carnahan and Delavan B. Cole, the following proceedings were had:

Trial by jury was waived by a stipulation in writing duly signed and filed and the cause was submitted to the court.

14 Thereupon, the Government, to maintain the issues on its part, introduced the following evidence:

JOSEPH A. PAINTER, a witness produced, sworn and examined on behalf of the Government, testified as follows:

Direct examination by Mr. PAGIN:

My name is Joseph A. Painter. I am deputy collector of internal revenue for the first district of Illinois, embracing the city of Chicago. I know the defendant, August Cliff. He is a general grocer, and retail dealer in oleomargarine, corner of Randolph and State street, Chicago. On December 22, 1902, I called at his place of business in the course of my duties and found this 10-pound package of oleomargarine which had been colored with palm oil to a very decided shade of yellow, like natural June butter, bearing a tax-paid stamp of ¼ of a cent a pound. The contents of the package, which is here in court, was composed of oleo oil, neutral lard, cotton-seed oil, milk, common salt and palm oil. The color was presumably imparted by the palm oil. That was the only coloring ingredient that would give it that shade. The oleomargarine was manufactured in December, 1902, by Wm. J. Moxley, incor-

15 porated, factory No. 5, corner of Clinton and Randolph streets, Chicago. The package was put up marked, stamped and branded in every respect in accordance with the acts of Congress relating to oleomargarine and the regulations of Secretary of the Treasury and Commissioner of Internal Revenue except that it bore only a tax-paid stamp of ¼ of a cent per pound. The defendant admitted to me at the time that he purchased and received from the Moxley Company the oleomargarine in question for the purpose of sale as oleomargarine, knowing its character and ingredients and the amount of tax paid thereon. I have been instructed by the Commissioner of Internal Revenue that palm oil does produce an artificial coloration in oleomargarine that causes it to look like natural butter of a shade of yellow. The Commissioner ruled that palm oil was an artificial color, and if used in the manufacture of oleomargarine in small quantities it would subject the product to the tax of ten cents per pound. This ruling is contained in the following letter from the Commissioner to W. J. Moxley, of August 11, 1902, which is admitted in evidence and is in the words and figures following; to wit:

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
WASHINGTON, D. C., *August* 11, 1902.

16 SIR: On June 23, 1902, you submitted to this office a sample of crude palm oil for inspection by the chemist of the bureau with the view of ascertaining whether or not such palm oil would be considered a legitimate incredient of oleomargarine.

After making full examination and chemical analysis of the samples submitted, you were notified by office letter of July 2 that the oil was rancid, of bad taste and smell, and that it was considered by this office wholly unfit for use in oleomargarine.

On July 11 you submitted a sample of what you termed "refined palm oil," and asked for expression as to whether this oil would be classed as a vegetable oil and whether in its present condition it would be considered a suitable and proper ingredient of oleomargarine. This sample was examined and subjected to chemical analysis in the office laboratory. It was found to contain a large amount of free fatty acid; it was by no means free from disagreeable odor and taste, and was of a very deep red or orange color. If oil like the sample were used in any considerable quantity as one of the fatty ingredients, it would undoubtedly cause a condition under which this office would rule that the oleomargarine contained an ingredient deleterious to public health and offensive in taste and odor.

17 After this second sample had been submitted and the matter was under advisement in this office, fullest opportunity was given for hearing and oral argument by you and others interested upon the subject of the use of palm oil in the manufacture of oleomargarine. As a result of the examination made of the samples of oil submitted, it was virtually agreed at the hearing that palm oil of the grade of the samples examined could not be introduced into the manufacture of oleomargarine in considerable quantities as oleo oil, neutral oil, cotton-seed oil, butter, or milk is now introduced, but only in quite small quantities or proportions. It was further found by examination in this office that, take any given quantity of unartificially colored oleomargarine—the same being virtually white in appearance—if three-tenths of 1 per cent. of the palm oil submitted was introduced therein it would give to the finished product a shade of yellow, and that the finished product would in appearance be in imitation or semblance of butter. In other words, that if to the finished sum total of uncolored oleomargarine in weight 1,500 pounds there was added a little less than 5 pounds of this palm oil, the result would be a marked change in color, there being secured through the introduction of the palm oil to the finished pro-
18 duct, a shade of yellow, causing the finished product to look like butter.

Under the law a tax of 10 cents per pound is assessed against oleomargarine unless it is free from artificial coloration that causes it to look like butter of any shade of yellow, in which case the tax is one-fourth of 1 cent per pound.

This office rules that where so minute and infinitesimal a quantity of a vegetable oil is used in the manufacture of oleomargarine as is proposed to be used of palm oil, and through its use the finished product looks like butter of any shade of yellow, it cannot be considered that the oil is used with the purpose or intention of being a *bona fide* constituent part or element of the product, but is used solely for the purpose of producing or imparting a yellow color to the oleomargarine, and, therefore, that the oleomargarine so colored is not free from artificial coloration and becomes subject to the tax of 10 cents per pound.

Respectfully, J. W. YERKES, *Commissioner.*

Mr. W. J. Moxley, Chicago, Ill.

In answer to a question by the court, the district attorney stated that it was not claimed that the defendant offered the article for sale as butter.

Thereupon the Government rested.

19 Thereupon the defendant, to maintain the issued upon his part, offered and introduced the following evidence:

ANDREW E. BERGLAND, a witness produced, sworn and examined on behalf of the defendant, testified as follows:

Direct examination by Mr. KEARFUL:

My name is Andrew E. Bergland. I am foreman for the Moxley butterine factory, and have been so employed for eighteen years. I superintend the manufacture of the article in this package here in question. Its ingredients and their proportions are: Three pounds of oleo oil; 1 pound and twelve ounces of neutral lard; two pounds of cotton-seed oil; one pound and fourteen and a half ounces of milk; one pound and four ounces of salt; one and one-half ounces of palm oil. The article so manufactured was according to a formula used in the course of business, with the exception of the palm oil. It is what we call the "Daisy" grade, the lower grade. It is a substitute for butter

20 WILLIAM HOSKINS, a witness produced, sworn and examined on behalf of the defendants, testified as follows:

Direct examination by Mr. KEARFUL:

My name is William Hoskins. I am a chemist and have been for the past twenty years. I am familiar with the chemical properties of oleomargarine or butterine and with the chemical properties of butter. My knowledge of those properties is based upon the result of actual contact in the laboratory, chemical analysis and microscopical examination, and my general education and experience as a chemist. The difference in the chemical properties of an article manufactured according to the formula testified to by Mr. Bergland and the properties of good butter would be due to a difference in

proportion of some of the constituents. More particularly those constituents which are peculiar to butter, such as butyrin and some other allied substances, caproin and caprin, in very small proportions, which are characteristic of butter. The principal characteristic of butter is butyrin. The others not characteristic of oleomargarine are very small in proportion. In the fat of butter the proportion of this characteristic constituent, butyrin, varies somewhat but it would be approximately six per cent. It is not entirely absent from oleomargarine or butterine. There would not be so much of it, but inasmuch as the oleomargarin-
21 is churned up with milk or cream there must necessarily be a small proportion of butter fat incorporated with the product; therefore it would contain the same constituents although in much smaller proportions. The other substances characteristic of butter are infinitestimally small. There is nothing, in my opinion, in the difference between the properties of oleomargarine and good butter which is unwholesome or deleterious. I am familiar with the chemical properties of the substance known as palm oil. The difference between the chemical properties of palm oil and good butter is greater than in the comparison made with butterine or oleomargarine, because, so far as it has been observed, palm oil contains none of these characteristic constituents that I refer to, but it does contain the same constituents as the other fats, olein, stearin and palmitin except in proportion. The elements which are absent in palm oil, such as butyrin, give to butter its characteristic flavor.

I have taken pains to investigate the subject of palm oil so as to ascertain its origin, chemical properties and uses. The palm oil that we know as the palm oil of commerce is the product of the fruit portion of the fruit of a particular kind of palm that grows in certain portions of east Africa; whether it grows in other parts of the world I do not know. I refer to the fruit portion as distin-
guished from the seed, which is not the source of the oil referred
22 to. It is used by the natives of that country, where it is produced, to mix with their food. It is an edible oil. In my opinion there is nothing deleterious or unwholesome in the use of palm oil, in the proportion in which it is used in this formula.

Cross-examination by Mr. PAGIN:

A very small proportion of palm oil is necessary only to produce what is considered a desirable color in oleomargarine. The color of palm oil is a reddish yellow. Its natural color is such that it may be used to make oleomargarine or white substances to look like butter. It affects the taste but little, although it does affect the taste.

Q. Do you know whether it affects the taste so as to make it taste more like butter or less like butter than the ingredients of the oleomargarine?

A. I can hardly answer that question, because the taste of butter varies within such a wide range that I might say that sometimes I

think a small addition would make it taste more like butter and sometimes less like butter.

Q. There is a difference between the taste of oleomargarine and butter, isn't there?

A. If oleomargarine is well made in my experience with it, it very closely resembles the taste of butter.

23 MARK DE LA FONTAINE, a witness produced, sworn and examined on behalf of the defendant, testified as follows:

The COURT: Is this for the purpose of corroborating this last witness?

Mr. KEARFUL: Yes, your honor.

The COURT: The Government does not intend to use any witness on this point?

Mr. BETHEA: No sir.

The COURT: I do not see any use of multiplying it.

Mr. KEARFUL: I will have to use the Professor on a point that was not covered by the last witness.

The COURT: Very well.

Direct examination by Mr. KEARFUL:

My name is Mark de la Fontaine. I am a chemist and have been for fifty years. I am and for several years have been familiar with the chemical properties and generally with the substance known as palm oil. As to its being a proper substance for use as food, I know that it is quite as digestible as any other of the fats that we
24 use for food, as lard, and even butter. I know it from my own experience. The color is variable. The crude oil has a very strong, dark-orange color, but after being refined, that color becomes lighter, and the oil may be so treated as to become colorless, or retain only a faint-yellow color. As to the propriety of using in oleomargarine a large proportion of palm oil from which the color has been refined, there would be no objection to it as a food, for this reason, that in addition to its color the palm oil has also a particular flavor, but the process of refining, as far as I understand it, does away both with much of the flavor and much of the color, so that refined palm oil ultimately will find its way on the market, as a regular article of food, perhaps not in this country where we have lard in plenty and other fats, but in other countries.

Cross-examination by Mr. PAGIN:

As to the price of palm oil, I know it is very cheap because it is largely used in the old country for the manufacture of soap, and even now in this country, but I do not know how much it would cost.

Q. But if it has any color, it is some shade of yellow, is it?

A. It is yellow. The crude oil is very dark-orange red.

Q. Orange is a shade of yellow, isn't it?

A. Yes, sir, orange is a shade of red, too; it is between red and yellow.

Q. Well, a mixture of red and yellow?

A. Yes, sir.

25 HENRY BOEHMER, a witness produced, sworn and examined on behalf of defendant, testified as follows:

Direct examination by Mr. KEARFUL:

My name is Henry Boehmer. I live at Barrington, Illinois. I am a manufacturer of creamery butter, and have been engaged in that business about 24 or 25 years. I am familiar with the business of manufacturing creamery butter generally throughout the western portion of the United States.

Q. Are you able to state the custom of butter manufacturers in regard to coloring butter throughout the year?

Mr. BETHEA: I object to that. It seems to me that is entirely immaterial and irrelevant and incompetent.

The COURT: Yes, I do not think that is proper. You are getting at these ingredients and what palm oil is used for.

Mr. KEARFUL: It seems to me, your honor, that it is necessarily a part of our case; and, while your honor may differ with me, I would like to have this evidence in.

Mr. BETHEA: Make your offer.

The COURT: The object is to show that there is artificial coloring matter used in the manufacture of butter,—is that it?

Mr. KEARFUL: Well, it goes a little further than that. I want to state the proposition to the court. Now, this case will have to
26 turn, your honor, upon the effect of this statute as it may be observed by the court in its operation, and if it is observed to operate so as to prevent the people of the country from obtaining oleomargarine in the way in which they want it, and to destroy the business of oleomargarine because the manufacturer cannot sell it to the people in the way in which they want it, that will be one branch of our contention that it is a discrimination which deprives these parties of their liberty and property without due process of law. Now, the fact being that whether it is butter or whether it is oleomargarine the people want it a uniform shade of color throughout the year, and they won't buy white butter or they won't buy white oleomargarine; and in the presence of that fact, Congress places such a tax upon one of those articles as to prevent its being used and sold. It is therefore necessary to show as an essential fact that oleomargarine and butter, one used as a substitute for the other, are commonly colored a uniform color throughout the year, because that is the demand of the consumers; and I want to say this, that if it should turn out that our contention is correct—if your honor should take the wrong view of this matter, as courts may do sometimes—it would only result in this case being sent back for further hearing in order to determine the facts upon that point.

The COURT: I think you may make what showing you please, and then they may move to strike it out.

Mr. BETHEA: We do not care to have it go in, but we
27 want our objection in where we think the evidence is improper.

It was agreed that it should be understood that the Government's counsel objected to this line of testimony; but that it should be received and the right of the Government reserved in all cases to move to strike it out.

Mr. KEARFUL: What is the custom in regard to coloring butter amongst manufacturers?

A. Why, it is colored with a color, artificial color that we buy.

Q. To what extent throughout the year is it colored?

A. Well, there is a difference. Different places require different colors, but as a general rule, what we call a June color. It is the color what we should give it here. Grass should give that color to butter. That is why we call it June color.

Q. Do you try to obtain the color of June butter?

A. Yes, that is what we call the June color.

The COURT:

Q. Don't you color June butter also?

A. Yes, sir, but not as much as butter made in December. That is the only difference.

Mr. KEARFUL:

Q. What is the natural color of butter in December and other months of the year when cattle do not get clover and grass?

A. At this time of the year and the time of the year when there is no grass, it is, you might say, white, or pretty near a perfect white.

Q. In the creamery business is there any demand for butter in its natural condition and with its natural color?

A. No, sir.

Q. Do you know whether there is any demand amongst butter manufacturers for uncolored butter?

A. Not that I know of, I don't think there is, because what I have seen is all colored.

28 Q. Have you any knowledge of the character of the butter to be found upon the tables throughout the United States or any part of it?

A. Why, all the butter I have seen is colored, more or less. Different places has different colors sometimes, different sections of the country each has a uniform color that it demands.

Cross-examination by Mr. BETHEA:

Q. They do not color butter in the summer time when cows are eating clover, do they?

A. Yes, sir.

Q. Why do they do that?

A. Why—I never made butter, or saw butter made at any time of the year but that comes to what we call the June color, they all color it some. But that time of the year, perhaps they only use—oh, about a quarter (that is, when there is clover or grass) of the amount that they use at this time of year.

Q. Doesn't clover make the butter naturally a butter color, a butter yellow?

A. It don't make it as high color as the people want it.

Q. Well, you do not mean to say that they do not use any butter in the natural condition at any time of the year, that nobody uses it?

The COURT: In the market, he says.

Mr. BETHEA:

Q. In the market. What do you say about that?

29 A. Why, I do not think that there is one farmer out of a thousand that puts on the market the kind of butter we make but that is colored the year around.

Q. You do not mean to say that in the market there is no natural butter at any time of the year?

A. Why, there is natural butter, but it is colored.

Q. I mean with the natural butter color. Suppose it is June or July?

A. I do not think there is.

Q. Isn't there some butter sold anywhere in June or July that is not colored?

A. Not what we call the regular butter put on the market.

Q. Don't the farmers bring in butter and sell it?

A. I do not think they do very much. I think most of the farmers' butter is colored.

Q. What is the use of coloring it in the summer time when it is naturally the color that gives the reputation to butterine?

A. Because people want the color, so we color it.

The COURT: So as to make a uniform color?

A. Yes, sir, that is the aim of coloring June butter.

Mr. BETHEA:

Q. You can remember, can't you, when butter was sold in its natural way?

A. Why, I do in the old country, but I do not remember in this country. I have lived in this country about thirty years.

Q. Now, aren't you mistaken about that?

A. No, I am not, because I have been in business twenty-six years, I think,—twenty-five or twenty-six.

30 Q. Do you mean to say that thirty years ago that the people in this country, the farmers, people who produced butter, colored it in the summer time?

A. I do not say thirty years, but I say twenty-six, because I have been in the business twenty-five or twenty-six years.

Q. Well, this butter was a pretty good article that was not colored, wasn't it, in its natural condition?

A. Why, as far as taste the article is all right.

Q. Yes, and looks? Take the summer butter, how could you improve on that, natural butter, where the cows have been eating grass and clover?

A. Why, it might be all right, it would be all right for me, because I would know what it was. But for the people that we sell it to, they would rather have the color.

Q. Why? Are they afraid it is oleomargarine if it is not colored?

A. Well, that I do not know.

Mr. KEARFUL: Does the idea of the uniformity of the butter which comes into the market have anything to do with coloring butter which is already naturally a butter color?

The COURT: He has answered that the object of coloring it is so as to make it uniform.

Mr. BETHEA: Yes, he stated that. Now, I move to strike out his testimony as incompetent, irrelevant and immaterial.

The COURT: Of course, as an abstract proposition, it is hard to see why there should be any difference between coloring oleomargarine and coloring butter, but I cannot see but that Con-
31 gress, in the exercise of its police powers, for various purposes, among which might be the assistance in detecting the difference between butter and oleomargarine, and other purposes incident to the detection of oleomargarine to prevent imposition on the public——

Mr. KEARFUL: Pardon me one moment, if your honor will.

The COURT: Yes.

Mr. KEARFUL: I suggest that ruling upon this objection might be reserved until the evidence is all in, when the matter can be argued and the points presented.

The COURT: Have you got more evidence on this point?

Mr. KEARFUL: Yes, sir.

The COURT: I thought you were through. I think I am sufficiently advised on the point now, and will say that for the purpose of this hearing the testimony may be stricken out.

To which ruling of the court the defendant, by his counsel, then and there duly excepted, which exception was duly allowed.

ANDREW AMUNDSEN, a witness produced, sworn and examined on behalf of defendant, testified as follows:

Direct examination by Mr. KEARFUL:

My name is Andrew Amundsen. I live at 1201 Milwaukee avenue. I am in the butter and butterine business. I started
32 five or six years ago in butter, and I could not make any success of that, so I went into butterine, and I increased it, and I doubled it every year, up to July 1st, 1902, when I was selling 2,600 pounds a week, and when the law went into effect, there was

an eruption throughout the whole trade. Every customer I had quit. They didn't want it. When I came around with white butterine, they would try it once, and the next time I came around they met me in the door and said, "We don't want any more of your lard." Then I tried with butter, and of course the majority of my trade now they take one pound of butterine for cooking purposes, while they take two or three pounds of butter for table use. The butterine I sold came from the Wm. J. Moxley factory.

Q. What class of people did you supply with oleomargarine?

A. Well, the laboring class, the majority of them, you might say all of them, the laboring class. They knew it was oleomargarine and not butter, and they bought it because it was cheaper than butter.

Q. What districts of Chicago did you supply?

A. Well, I go as far as Dakota street, and over to Lake and over to Brighton park, and Dakota street over on the West side, Irving park, and Garfield park, and then to Lake avenue,—all around.

Mr. BETHEA: I move to strike out the testimony of the witness as incompetent, irrelevant and immaterial.

The COURT: It may go out.

To which ruling of the court the defendant, by his counsel, then and there duly excepted, which exception was duly allowed.

33 CHARLES F. IZARD, a witness produced, sworn and examined on behalf of the defendant, testified as follows:

Direct examination by Mr. KEARFUL:

My name is Charles F. Izard. I am in the restaurant business, located at 163 and 165 West Madison street, Chicago, and have been in the restaurant business for two years last April. I have used oleomargarine in my restaurant almost exclusively, except for cooking, up to July 1, 1902. Since that time we cannot use it. The reason is that people object to the color of it. They do not like the looks of it. It don't seem to give them satisfaction, because it is white. Since July 1st, 1902, we have been using colored butter.

Cross-examination by Mr. BETHEA:

Q. Didn't they object, or didn't they use the butterine where it was colored because they thought it was butter?

A. Why, they had no objection to butterine except when it came white, except it was white. They had no complaint to find with the oleomargarine that had color in it. It was after it came white they were objecting to using it or eating it.

Q. Why didn't you buy the colored oleomargarine when they objected to the white?

A. Well, we had to do that, of course.

Q. That cost ten cents a pound more?

A. Yes, sir.

34 Q. Is that what you buy now?

A. Well, sometimes we buy that and sometimes we buy this here other.

Q. White?

A. No, not the white, colored butter. We cannot use white at all.

Redirect examination by Mr. KEARFUL:

Q. Do you use white oleomargarine for any other purpose than for use on the table?

A. We use it for cooking where we don't use lard.

Q. What proportion of the colored article that you now buy is oleomargarine and what proportion butter?

A. We do not use any oleomargarine now excepting we happen to run out of butter or something of that kind. In the case of an emergency we buy it.

Q. What is the reason you don't buy it now as formerly?

A. Well, it depends upon how much we have, that is, how much the man has on hand that happens to come along that we buy it from, something of that kind. We have objection to this ordinary oleomargarine. We have no objection to the oleomargarine that is colored at all. It gives perfect satisfaction.

Recross-examination by Mr. BETHEA:

Q. Can you get good butter now cheaper than you can get this colored oleomargarine?

A. No, sir.

35 Q. Do you know what the difference is in the price?

A. Well, it varies considerably. It depends upon the quantities you buy and whom you buy it from.

Q. How much, about how much?

A. Oh, it may vary a couple of cents.

Mr. BETHEA: We move to strike out the testimony of this witness on the ground that it is incompetent, irrelevant and immaterial.

The COURT: The motion will be sustained.

To which ruling of the court the defendant, by his counsel, then and there duly excepted, which exception was duly allowed.

JOHN DADIE, called and sworn as a witness on behalf of the defendant, testified as follows:

Direct examination by Mr. KEARFUL:

Myname is John Dadie. I am secretary of the William J. Moxley corporation. That corporation is engaged in the manufacture of oleomargarine or butterine for sale in the various parts of the United States. It manufactured the article involved in this case.

The COURT: Did you use "oleomargarine" and "butterine" interchangeably?

A. We call it oleomargarine legally. In trade it is known as butterine.

Mr. PAGIN: The law defines oleomargarine to be butterine
36 and things called by other names so that the legal term is oleomargarine.

The WITNESS: Oleomargarine or butterine is designed to be used as a substitute for butter, and we color it as butter is colored in order to compete with it. I have been engaged in the business of manufacturing oleomargarine since 1884. The capacity of the Moxley Company factory is in the neighborhood of three to four million pounds per month. It is the largest in the United States. Previous to July 1, 1902, the total output sometimes reached but never exceeded about 2,000,000 pounds per month. The output since July 1st, 1902, has varied from 500,000 to 1,000,000 pounds per month. From my knowledge of the manufacture of this article I know that it cannot be manufactured and sold at a profit in competition with butter if the ten-cent tax is paid. This opinion is based largely upon our experience in manufacturing artificially colored goods upon which we are compelled to pay a tax of ten cents a pound. During the first five months of the present fiscal year, beginning July 1, 1901, we failed to sell any of it at all. During the month of December we did manufacture and sell 37,594 pounds of artificially colored butterine or oleomargarine upon which the ten-cent tax was paid. The article turned out by our factory previous to July 1st, 1902, was all of it artificially colored. The uncolored article which we now put out is sold at the present time in its uncolored
37 state largely to the poorer people, and so far as we are able to ascertain, it is displacing lard and is used for cooking purposes rather than for table use.

Q. Will you state if you know why you have been able to sell some colored oleomargarine upon which you have paid the ten-cent tax during the month of December, although you say that you cannot manufacture this article and sell it at a profit in competition with butter if you pay the tax?

A. For the reason that the price of natural butter during the month of December has been extremely high. The market has reached 29 cents a pound, and under these conditions we have been able to manufacture and sell artificially colored oleomargarine upon which the ten-cent tax was paid, at the price of 24 cents a pound. Now, if the price of butter should drop back to the normal condition of 24 and 25 cents, and I believe that it has within the last few days, we would be practically unable to compete with it in oleomargarine. The average price for butter the year around is approximately in the neighborhood of 25 cents a pound. I am speaking now of the best grades of creamery butter. Dairy butter is considered of a poorer grade, and is sold for considerably less money.

Cross-examination by Mr. PAGIN:

Q. How long prior to July 1st, 1902, were you in the business of manufacturing oleomargarine?

A. Since 1884.

Q. You said that the output of your factory never exceeded 2,000,000 per month before that date?

A. Yes, sir.

38 Before July 1st, 1902, for 12 months before that time, I think the average output would approximate to one and a half million pounds a month. Since that date, July, August, September, 1902, we sold one million and a half pounds for the whole period; and October, November and December we sold two and a half million pounds for that period. Before July 1st, 1902, we used only the Wells-Richardson improved butter color to produce an artificial coloration. Since that date we have been using the same article. We have used some palm oil. We used that for a few days only until the Commissioner of Internal Revenue ruled that its use would subject the product to the ten cent tax. Prior to July 1st, 1902, we had only experimented with it.

Redirect examination by Mr. KEARFUL:

The reason why the uncolored oleomargarine has displaced lard and other substances for cooking purposes is because the price of the two articles is practically the same. At the present time they are selling lard at ten and a quarter cents a pound and butterine at twelve and a half, and the articles being nearly the same price, oleomargarine displaces lard, because it is preferable for cooking purposes. The price of lard at the present time is considered remarkably high. It usually sells from seven to eight cents a pound at this time of the year, and if it should fall to that price the

39 market for uncolored oleomargarine would be greatly reduced.

As to whether we could manufacture and put on the market oleomargarine at seven or eight cents a pound, that would depend altogether on the price of the ingredients that go to make up oleomargarine, but that would be highly improbable.

At the present time the price of oleomargarine, stock or raw material is, like butter and lard, unusually high.

Thereupon the Government, by its counsel, moved to strike out the testimony of the witness; which motion was allowed by the court; to which ruling of the court the defendant, by his counsel, then and there duly excepted, which exception was duly allowed.

The defendant then offered in evidence a letter of the acting Commissioner of Internal Revenue, dated November 11th, 1902, to W. D. Guthrie, which reads as follows:

"SIR; The amount of tax collected on oleomargarine at ten cents and one-quarter cent per pound, from July 1st to October 1st, 1902, are as follows: Oleomargarine at ten cents per pound, $9,247.92; oleomargarine at one-quarter cent per pound, $33,718.71. The amount collected at two cents per pound during the same period of 1901, was $491,921.82.

Respectfully, ROBERT WILLIAMS, JR.,
Acting Commissioner."

Mr. BETHEA: We do not object to the form of the evidence, but we object to the facts stated therein as immaterial and irrele-
40 vant.

Which objection was sustained by the court; to which ruling the defendant, by his counsel, then and there duly excepted, which exception was duly allowed.

Thereupon the defendant rested.

Thereupon the Government, in rebuttal, introduced the following evidence:

JOSEPH A. PAINTER, recalled on behalf of the Government, testified as follows:

Direct examination by Mr. BETHEA:

Q. Mr. Painter, have you made yourself acquainted with the market here in reference to the kind of butter that has been sold the last two years or is being sold now?

A. I am very well acquainted with it, yes, sir.

Q. What is the fact about there being any butter sold in the natural condition, or offered for sale?

A. Natural condition?

Q. Yes, uncolored.

A. Uncolored?

Q. Yes.

A. Well, there is some uncolored butter in the market which is confined, I believe, entirely, as far as I am aware, to the Jewish settlement; sweet butter, we call it, unsalted.

41 Q. You do not know how much the sale of it is limited?

A. I never found it in any other locality except in the Jewish settlement. I never found it anywhere else in the city.

Q. You do not know but they may sell that at the good hotels and restaurants and cafés here to people that want it?

A. Why, they may.

Q. Have you independently any knowledge as to what kind of butter is used part of the time at the best hotels?

A. I do not know.

Thereupon the Government rested in rebuttal.

The above and foregoing transcript contains all the evidence introduced, or offered to be introduced, on the trial of said cause.

42 Thereupon the defendant moved the court to find in favor of the defendant and to render a verdict and judgment of not guilty and to discharge the defendant, which motion is in the words and figures following, to wit:

UNITED STATES OF AMERICA,
Northern District of Illinois, Northern Division, } ss:

In the District Court, December Term, A. D. 1902.

UNITED STATES OF AMERICA
vs.
AUGUST CLIFF. } Information.

Motion to Find the Defendant Not Guilty.

Comes now the defendant by his counsel and, upon the evidence before the court, moves the court to find in favor of the defendant and render a verdict and judgment of not guilty and that he be discharged, because the act of Congress relating to butter and oleomargarine of August 2, 1886, as amended by the act of Congress of May 9, 1902, in so far as it imposed a tax of ten cents per pound on oleomargarine containing "artificial coloration that causes it to look like butter of any shade of yellow," and in so far as it authorizes the Commissioner of Internal Revenue "to decide what substances, extracts, mixtures or compounds which may be submitted for
43 his inspection in contested cases are to be taxed under this act," and provides "that his decision in matters of taxation under this act shall be final," *it* is in contravention of the Constitution of the United States and of the amendments thereto, and is illegal and void for the following reasons, to wit:

First. The act deprives the defendant and the oleomargarine manufacturers and dealers in the United States of their liberty and property without due process of law;

Second. The act is an unwarranted encroachment upon and interference with the police powers reserved to the several States and to the people of the United States;

Third. The act invests an inferior executive officer with the power finally and arbitrarily to determine essentially judicial questions concerning vast property rights.

Fourth. The act so arbitrarily discriminates against oleomargarine in favor of butter in the United States as to be repugnant to those fundamental principles of equality and justice which are inherent in the Constitution of the United States.

Dated January 22, 1903.

WILLIAM D. GUTHRIE,
CHARLES C. CARNAHAN,
FRANCIS J. KEARFUL,
DELAVAN B. COLE,
Attorneys for Defendant.

Mr. KEARFUL: Upon this motion we should like to be heard.

The COURT: I do not think I want to hear you. I think it is a matter so peculiarly for the Supreme Court that it should go there. I might say that it seems to me to call for the decision of that court upon the constitutionality of the act. I think the matter is well

worthy of consideration. I do not think that this court
44 however should go back of the statute.

Mr. KEARFUL: I will concede to your honor, if you will permit me, that it would be entirely proper in a case of a statute of doubtful constitutionality for the lower court to hold a statute constitutional and let the Supreme Court pass upon it; but I believe that it is the established rule that if the statute is so clearly unconstitutional that it can be demonstrated to the court that it should be held so by the court. And while the rule is different in the case of a doubtful statute, to my mind there is no doubt here and I believe I can show the court the reasons which may induce it to believe as I do, that there is no doubt of the unconstitutionality of the statute.

The COURT: No sir, I think this matter should go to the Supreme Court and be there decided. The statutes are not so doubtful in my mind as to warrant me in holding that they are unconstitutional. I therefore overrule the motion and find the defendant guilty.

To which ruling and finding of the court the defendant, by his counsel, then and there duly excepted, which exception was duly allowed.

Thereupon the defendant presented and filed the following motion for a new trial:

45 UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, Northern Division, }

In the District Court, December Term, A. D. 1902.

UNITED STATES OF AMERICA
vs.
AUGUST CLIFF. } Information.

Motion for New Trial.

Now comes the defendant and moves the court to set aside the finding of guilty herein and to grant a new trial of said cause for the following reasons, to wit:

(1.) The finding is contrary to the evidence.

(2.) The finding is contrary to the law.

(3.) The court struck out and refused to consider proper evidence offered and received on behalf of the defendant.

Dated January 22, 1903.

WILLIAM D. GUTHRIE,
CHARLES C. CARNAHAN,
FRANCIS J. KEARFUL,
DELAVAN B. COLE,
Attorneys for Defendant.

Which motion was by the court overruled; to which ruling the defendant, by his counsel, then and there duly excepted; which exception was by the court duly allowed.

46 Thereupon, the defendant, by his counsel, presented and filed a motion in arrest of judgment upon the same grounds

as those specified in his foregoing motion to find the defendant not guilty; which grounds the counsel for the respective parties agree may be here considered as inserted herein; which motion in arrest of judgment was by the court overruled; to which ruling, the defendant, by counsel, then and there duly excepted; which exception was by the court duly allowed.

Thereupon, the defendant, being present in open court, the court pronounced its judgment upon the aforesaid finding of guilty and adjudged that the defendant pay a fine of fifty dollars ($50.00) and costs, and that execution issue therefor.

Thereupon, the defendant, by his counsel, gave oral notice in open court of his intention to apply for a writ of error to review said judgment and proceedings in the Supreme Court of the United States, and prayed for a stay of execution to enable him to prepare and file a bill of exceptions.

Thereupon, the court ordered execution of said judgment to be stayed for a period of twenty days and allowed the defendant twenty days within which to prepare and file a bill of exceptions.

47 And now in furtherance of justice and that right may be done, the defendant presents the foregoing as his bill of exceptions in this case, and prays that the same may be settled and allowed and signed and certified by the judge as provided by law.

WILLIAM D. GUTHRIE,
FRANCIS J. KEARFUL,
CHARLES C. CARNAHAN,
DELAVAN B. COLE,
Attorneys for Defendant.

The foregoing bill of exceptions is true in all respects and is hereby approved, allowed and settled and made a part of the record herein.

Done in open court at the December term, 1902, and dated this 27 day of January, 1903.

KOHLSAAT, *Judge.*

Endorsed: 3415. U. S. dist. court, nor. dist. of Ill. The United States *vs.* August Cliff. Bill of exceptions. Filed Jan. 27, 1903 at 10 o'clock a. m. T. C. MacMillan, clerk.

48 And afterwards, to wit, on the 27th day of January, A. D. 1903, there were filed in the clerk's office of said court in the above-entitled cause, a petition for writ of error and assignment of errors; same being in the words and figures following to wit:

UNITED STATES OF AMERICA,
Northern District of Illinois, Northern Division, } ss:

Petition for Writ of Error.

In the District Court, December Term, A. D. 1902.

UNITED STATES OF AMERICA
vs.
AUGUST CLIFF. } 3415. Information.

And now comes August Cliff, defendant herein, and says that on the 22nd day of January, 1903, this court entered judgment herein in favor of the plaintiff and against this defendant, in which judgment and the proceedings had prior thereunto in this cause certain errors were committed, to the prejudice of this defendant, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, this defendant prays that a writ of error may issue in this behalf returnable in the Supreme Court of the United States, for the correction of the errors so complained of, that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Supreme Court of the United States, and that an order may be made fixing the amount of security which the defendant shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in
49 this court be suspended and stayed until the determination of said writ of error by the Supreme Court of the United States.

WILLIAM D. GUTHRIE,
FRANCIS J. KEARFUL,
CHARLES C. CARNAHAN,
DELAVAN B. COLE,
Attorneys for Defendant.

50 UNITED STATES OF AMERICA,
Northern District of Illinois, Northern Division. }

In the District Court, December Term, A. D. 1902.

UNITED STATES OF AMERICA
vs.
AUGUST CLIFF. } Information.

Assignment of Errors.

The defendant in this action, in connection with his petition for a writ of error, makes the following assignment of errors which he avers occurred upon the trial of the cause, to wit:

I.

Error in refusing to hold that the provisions of the act of Congress relating to oleomargarine and butter of August 2, 1886, as amended by the act of Congress of May 9, 1902, under which the defendant was convicted, are in contravention of the Constitution of the United States and the amendments thereto, because:

51 (1.) The said provisions deprive the defendant and the oleomargarine manufacturers and dealers in the United States of their liberty and property without due process of law.

(2.) The said provisions constitute an unwarranted encroachment upon and interference with the police powers reserved to the several States and to the people of the United States.

(3.) The said provisions invest an inferior executive officer with the power finally and arbitrarily to determine essentially judicial questions concerning vast property rights.

(4.) The said provisions so arbitrarily discriminate against the oleomargarine industry in favor of the butter industry in the United States as to be repugnant to the fundamental principles of equality and justice inherent in the Constitution of the United States.

II.

Error in striking out and refusing to consider proper evidence offered and received on behalf of defendant, showing:

(1.) That the natural color of butter varies at different seasons of the year from almost pure white in the winter season to a

52 high shade of yellow in the spring season, if made from the milk of grass or clover fed cows; and that all butter during all seasons of the year, including that made from the milk of grass or clover fed cows, is uniformly colored a shade of yellow somewhat deeper than the natural color of June butter, before it is put on the market;

(2.) That there is no demand in the market for butter having only its natural color except June butter, and that there is no demand in the market for oleomargarine for table use unless the same is colored a shade of yellow which causes it to look like yellow butter;

(3.) That oleomargarine is a substitute for and competes with butter, and that the market demand for both butter and oleomargarine requires that they shall have a uniform color or a shade of yellow during all seasons of the year;

(4.) That the cost of production of oleomargarine is such that after payment of a tax of ten cents per pound thereon, as required by the act of Congress relating to butter and oleomargarine, of August 2, 1886, as amended by act of Congress of May 9, 1902, the same cannot be sold in competition with butter.

(5.) That the operation and effect of said act of Congress, as amended, relating to butter and oleomargarine are to prevent the

people of the United States from obtaining oleomargarine in
53 the condition in which they want it, and to destroy the oleomargarine industry in the United States and unjustly to discriminate against the same in favor of the butter industry.

WILLIAM D. GUTHRIE,
FRANCIS J. KEARFUL,
CHARLES C. CARNAHAN,
DELAVAN B. COLE,
Attorneys for Defendant.

Endorsed: District court of U. S. Northern district of Illinois. Northern division. Petition for writ of error and assignment of errors. United States *vs.* August Cliff. No. 3415. Filed Jan. 27, 1903, at 10 o'clock a. m. T. C. MacMillan, clerk.

54 And afterwards, to wit, on the 27th day of January A. D. 1903, the following order was had and entered of record in said cause, before the Hon. Christian C. Kohlsaat, judge, to wit:

UNITED STATES OF AMERICA
vs.
AUGUST CLIFF. } 3415.

This 27th day of January, A. D. 1903, came the defendant by his attorney, and filed herein his petition for a writ of error and an assignment of errors, to have reversed in the Supreme Court of the United States the judgment heretofore entered herein, and thereupon the court does allow the *the* said writ of error upon the defendant giving bond according to law in the sum of five hundred dollars, which bond shall operate as a supersedeas and stay of execution upon said judgment.

55 And afterwards, to wit, on the 27th day of January, A. D. 1903, there was filed in the clerk's office of said court, a bond on writ of error, the same being in the words and figures following, to wit:

UNITED STATES OF AMERICA,
Northern District of Illinois, Northern Division.

In the District Court, December Term, A. D. 1903.

UNITED STATES OF AMERICA
vs.
AUGUST CLIFF. } 3415.

Bond in Writ of Error.

Know all men by these presents, that we, August Cliff as principal, and William J. Moxley as surety, are held and firmly bound unto the defendant in error, The United States of America, in the full and

just sum of five hundred dollars ($500) to be paid said defendant in error, The United States of America, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seal and dated this 26th day of January in the year of our Lord one thousand nine hundred and three.

56 Whereas, lately at a district court of the United States of America, for the northern district of Illinois, northern division, in a suit pending in said court, between The United States of America, plaintiff, and August Cliff, defendant, a judgment was rendered against the said August Cliff, and the said August Cliff having obtained a writ of error and filed a copy thereof in the clerk's office of said court, to reverse the judgment in the aforesaid suit, and a citation directed to the said United States of America, defendant in error, citing and admonishing it to appear at a session of the Supreme Court of the United States to be holden at the city of Washington in the District of Columbia, on or before the 26th day of February next;

Now the condition of the above obligation is such that if the said August Cliff shall prosecute said writ of error to effect, and answer all damages and costs if he fail to make said plea good, then the above obligation to be void; else to remain in full force and virtue.

AUGUST CLIFF. [SEAL.]
WILLIAM J. MOXLEY. [SEAL.]

Sealed and delivered in the presence of:

FRANCIS J. KEARFUL.
JOHN DADIE.

Approved this 27 day of January, A. D. 1903.

KOHLSAAT,
United States District Judge.

Endorsed: No. 3415. District court of the northern district of Illinois, northern division. United States *v.* August Cliff. Bond on writ of error. Filed Jan. 27, 1903 at 10 o'clock a. m. T. C. MacMillan, clerk.

57 And afterwards, to wit, on the 28th day of January, A. D. 1903, there was filed in the clerk's office of said court, in the above-entitled cause, a præcipe for record, the same being in the words and figures following, to wit:

UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, Northern Division, }

In the District Court of the United States, December Term, A. D. 1903.

UNITED STATES OF AMERICA
vs.
AUGUST CLIFF. } 3415. Information.

Præcipe for Record.

The clerk of said court will make up an authenticated and complete transcript of the record in the above-entitled cause.

WILLIAM D. GUTHRIE,
FRANCIS J. KEARFUL,
CHARLES C. CARNAHAN,
DELAVAN B. COLE,
Attorneys for Defendant.

Endorsed: No. 3415. District court of the United States. Northern district of Illinois, northern division. United States of America *vs.* August Cliff. Præcipe for record. Filed Jan. 28, 1903. T. C. MacMillan, clerk.

58 NORTHERN DISTRICT OF ILLINOIS, } ss:
Northern Division, }

I, T. C. MacMillan, clerk of the district court of the United States for the northern district of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record in said court and made in accordance with præcipe filed in the cause entitled The United States *vs.* August Cliff as the same appear from the original records and files of said court now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at my office in the city of Chicago in said district and division, this second day of February A. D. 1903.

[Seal of Dist. Court U. S., Northern Dist. Illinois, 1855.]

T. C. MACMILLAN, *Clerk.*

59 And afterwards, to wit, on the 27th day of January, A. D. 1903, there was filed in the clerk's office of said court in the above-entitled cause, a writ of error, same being in the words and figures following, to wit:

Writ of Error.

UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable Christian C. Kohlsaat, judge of the district court of the United States for the northern district of Illinois, northern division, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said district court, before you, between The United States of America, plaintiff, and August Cliff, defendant, wherein was involved the construction and application of the Constitution of the United States, and wherein the constitutionality of a law of the United States was drawn in question, a manifest error hath happened, to the great damage of the said defendant, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at the city of Washington, on the 26th day of
60 February next, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error which of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 27th day of January in the year of our Lord, one thousand nine hundred and three.

[Seal of Dist. Court U. S., Northern Dist. Illinois, 1855.]

T. C. MACMILLAN,
Clerk of the District Court of the United States for the Northern District of Illinois, Northern Division.

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States a true and complete copy of the record and all proceedings in the foregoing-entitled cause, as witness my hand and official seal this 2nd day of February A. D. 1903.

[Seal of Dist. Court U. S., Northern Dist. Illinois, 1855.]

T. C. MACMILLAN,
Clerk of the District Court of the United States for the Northern District of Illinois.

Copy deposited for the defendant in error in the office of the clerk of district court of the United States for the northern district of Illinois.

[Endorsed:] Writ of error. Filed Jan. 27, 1903 T. C. MacMillan clerk.

61 *Citation.*

Supreme Court of the United States.

UNITED STATES OF AMERICA,
District Court of the Northern District of Illinois, Northern Division, } ss:

To the United States of America and Solomon H. Bethea and Oliver E. Pagin, its attorneys, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at the city of Washington, on the 26th day of February next, pursuant to a writ of error filed in the clerk's office of the district court of the United States for the northern district of Illinois, northern division, wherein August Cliff is plaintiff in error and The United States of America is defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

62 Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this 27th day of January, A. D. 1903, and of the Independence of the United States the one hundred and twenty-seventh —.

KOHLSAAT,
Judge of the District Court of the United States for the Northern District of Illinois, Northern Division.

Attest: T. C. MACMILLAN, *Clerk.*

Service of the within citation and receipt of a copy thereof admitted this 27th day of January, 1903.

S. H. BETHEA,
U. S. Att'y, Attorney for Defendant in Error.

Filed Jan. 27, A. D. 1903.

T. C. MACMILLAN, *Clerk.*

Endorsed on cover: File No. 18,842. N. Illinois D. C. U. S. Term No. 614. August Cliff, plaintiff in error, *vs.* The United States. Filed February 24th, 1903.